AMERICAN ASSOCIATION for JUSTICE

Formerly the Association of Trial Lawyers of America (ATLA®)

July 15, 2014

Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: In the Matter of Protecting the Open Internet (GN Docket No. 14-28)

Dear Chairman Wheeler:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM) regarding net neutrality.[1]

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. In this capacity, AAJ comments in order to protect access to the courts for claims involving open internet violations. AAJ recognizes that the inclusion of arbitration in the current proposed rule is authorized by the Administrative Dispute Resolution Act of 1996 (ADRA) which gave federal agencies the power to use arbitration as one method of resolving disputes.[2] In addition, Commission stakeholders have requested the use of expedited and/or informal methods for resolving disputes over the net neutrality rules. AAJ understands that in some circumstances, arbitration may be an effective and efficient way to resolve issues. However, certain features of arbitration have been found to harm both consumers and small businesses. AAJ requests that the FCC fully evaluate these features before committing to use arbitration as an alternative dispute resolution mechanism. We believe that the FCC should consider the potential impact of arbitration, in particular on consumers, before committing to any arbitration policy and that arbitration should never be mandated to resolve disputes, whether formal or informal. Indeed, the ADRA has specified that arbitration decisions have no impact on other causes of action nor serve as precedent in court or in any other arbitration proceeding.[3] Accordingly, the FCC should not make arbitration the *de facto* method for consumers to bring complaints regarding the legality of broadband provider practices.

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[1] 79 Fed. Reg. 37447.

[2] Administrative Dispute Resolution Act of 1996, H.R. 4194, 104th Cong. §572.

[3] *See* H.R. 4194: "An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding...by an agency, or in a court, or in any other arbitration proceeding."

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I. Pre-Dispute Arbitration Clauses Are Detrimental to Consumers

Consumers are regularly required to sign away their legal rights in favor of arbitration before a dispute even arises, foreclosing numerous legal rights. Arbitration clauses typically are (1) forced, (2) binding, and (3) pervasive. More explicitly, consumers and small businesses not only have no choice but to enter into arbitration in the event of dispute, but any results reached in the arbitration process are final and generally not reviewable by a court of law. Since arbitration decisions are not official court proceedings, they also hinder the development of the law itself as the growth of a body of law in the common law system requires the evolution of case law. Instead of contributing to the doctrine of *stare decisis*, arbitration decisions are akin to a "dead end" in that future judicial decisions cannot rely on arbitration outcomes regardless of the factual or policy similarities between cases. Furthermore, arbitrators are not required to have any legal training and often have a stake in the arbitration outcome. This is due to the fact that when a dispute arises, a provider will often refer the case to an arbitrator who previously decided cases in the provider's favor. Accordingly, arbitrators are motivated to rule for providers to attract their future business.

Additionally, because arbitration decisions are not required to be made public, consumers have little chance of uncovering an arbitrator's potential bias. Thus, in conjunction with mandating that arbitrations be overseen by FCC staff, the Commission should ensure an open and transparent arbitration process. Society benefits from an open legal process that exposes broadband providers' open Internet violations. One of the most important benefits of civil lawsuits is the discovery process, which often uncovers negligent or harmful corporate practices that lead to financial or even physical injury to the public. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keeps abusive practices hidden.

Further, arbitration is costly. In most cases, consumers must pay filing fees and the arbitrators' costs which can amount to thousands of dollars. For many, the upfront costs and ongoing fees are prohibitive and the provider is often allowed to choose the location of the arbitration, making it even more costly for the consumer. While we recognize that there are already some safeguards in place to protect against these issues, we believe that the FCC must evaluate these concerns and ensure that its arbitration policy is fundamentally fair to consumers.

a. Other Federal Agencies are Considering Banning or Limiting Arbitration

The net neutrality rules proposed by the FCC aims to correct an imbalance of power between broadband providers and consumers as currently, there are no legally enforceable rules by which the Commission can prevent broadband providers from limiting Internet openness. Indeed, broadband providers enjoy near monopolistic access to consumers as 17 access providers

accounted for about 93 percent of U.S. retail subscribers in 2013.[4] Arbitration could potentially add to this already unequal commercial landscape and would run counter to the FCC's stated intent to make the complaint process both accessible and effective, particularly for consumers and small businesses with limited resources.[5] Recognizing the possibility for bias when individuals are pitted against large corporations, several federal agencies have limited or banned the use of forced arbitration as a mechanism to resolve disputes.

b. Consumer Financial Protection Bureau and the Securities and Exchange Commission Are Moving Toward Restricting Arbitration

In the aftermath of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau (CFPB) to address the obvious and overdue need for greater transparency and accountability from America's powerful financial institutions. Congress recognized that forced arbitration was among the leading threats to consumer protection and explicitly empowered the bureau to ban or limit the use of forced arbitration in financial services or products through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[6] Before issuing a rule, the CFPB was required to study the use of forced arbitration against consumers in disputes over financial services and products, and to provide a report to Congress on its findings. The first part of the study was released in December 2013 and confirmed what consumer advocates have long known: forced arbitration suppresses consumer claims and allows corporate entities to completely evade consumer protection laws.

Similar to Dodd-Frank's empowerment of the CFPB to ban the use of forced arbitration, the law also changed arbitration agreements in the securities industry, signaling a shift away from federal policy favoring arbitration of securities disputes.[7] The passage of Dodd-Frank in 2010 signaled a pushback against forced arbitration and specifically, section 921 of the Act prohibits pre-dispute arbitration agreements between customers and brokers, dealers, or investment advisors that arise under the federal securities laws or the rules of a self-regulatory organization such as FINRA.[8] Should the Securities and Exchange Commission (SEC) limit the enforcement of arbitration agreements, investors will have greater access to the court system which, unlike arbitration, allows for discovery, the use of juries, precedent, and judicial review.

c. FINRA Is Moving to Correct Bias Amongst Arbitrators

In addition, even when arbitration is used, there has been a shift towards ensuring that consumers are more protected as a part of the process. Criticism of FINRA arbitration centers on

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[4] Jeff Baumgartner, Top U.S. MSO's & Telcos Added 2.6M Broadband Subs in 2013, Multichannel News (Mar. 17, 2014), *available at* http://www.multichannel.com/news/technology/top-us-msos-telcos-added-26m-broadband-subs-2013/325549.

[5] 79 Fed. Reg. at 37471.

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4173, 111th Cong. §1028(b).

[7] *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[8] *See* Dodd-Frank at § 921.

the possibility for bias on the three-person panel deciding consumer cases. A 2012 GAO report identified opportunities to improve SEC's oversight of the Financial Industry Regulatory Authority (FINRA), including the FINRA arbitration process.[9] Specifically, the report found deficiencies related to incorrect classifications of arbitrators and a lack of sufficient documentation in response to complaints or negative evaluation regarding an arbitrator.[10]

On July 3, 2014, notice of FINRA's filing with the SEC proposing redefinitions of "non-public" arbitrator and "public arbitrator" was published in the Federal Register.[11] The proposed rule signals FINRA's shift towards curbing abusive arbitration practices and preventing arbitrator bias by clarifying that an individual who worked in the financial industry for any period would not be eligible to serve as a public arbitrator.[12] Additionally, the rules increase the "look back" period for attorneys, accountants, and other professionals who devote 20 percent or more of their professional work to serving industry entities from two to five years.[13] This proposed rule aims to ameliorate the bias concerns of consumers who, if the rule is adopted, could opt to have their cases heard by a panel of three public arbitrators without past industry ties, eliminating a key concern that the arbitration process is rigged against consumers.

II. Scope of Proposed Alternative Dispute Resolution Provisions

In the NPRM, the FCC proposed to utilize arbitration or another alternative dispute resolution method in order to address open internet violations but does not specify the full breadth of what that might encompass. While FCC may have some authority to regulate the internet, this authority does not extend to consumers' civil remedies. As such, these proposed regulations should be limited in scope solely to create a process to address violations of the regulations and should have absolutely no impact on a consumer's civil remedies.

III. Conclusion

AAJ understands and appreciates the challenges faced by the FCC as the Commission crafts rules that both protect and promote the Internet as an open platform while providing for forms of dispute resolution that serves the interests of consumers and broadband providers alike. AAJ supports post-dispute, voluntary arbitration, as well as other types of dispute resolution processes when the consumer has a clear choice of whether to take her complaint to arbitration or court and has power over how an arbitration process should proceed. We urge the FCC to adopt dispute resolution procedures that are open and transparent and which protect consumers' legal rights while punishing the practices that threaten an open Internet.

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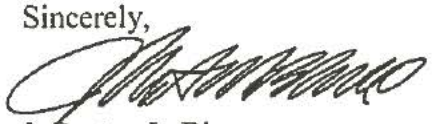
[9] "Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority," May 2012 GAO Report, *available at* http://gao.gov/assets/600/591222.pdf.
[10] *Id.* at 11.
[11] 79 Fed. Reg. at 38080.
[12] *Id.* at 38082.
[13] *Id.*

AAJ appreciates this opportunity to submit comments in response to the FCC's proposed rule regarding net neutrality. In addition, we have attached some recent studies on the impact of arbitration, to inform the development of the final rule. If you have any questions or comments, please contact Ivanna Yang, AAJ's Assistant Regulatory Counsel at (202) 944-2806.

Sincerely,



J. Burton LeBlanc
President
American Association for Justice